Office-Supreme Court, U.S.
FILED
MAY 5 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 196[illegible]

No. ~~[illegible]~~ 78

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

RICHARD P. CHARLES,
Special Counsel to
John A. Morhous,
Attorney for Appellee,
32 Court Street,
Brooklyn, N. Y.

RICHARD P. CHARLES,
WILLIAM C. MATTISON,
MARIO MATTHEW CUOMO,
Of Counsel.

INDEX

	PAGE
Report of Opinion in the Trial Court	1
Statement	2
Argument—The questions raised by appellants do not constitute substantial Federal questions	9
Conclusion	14

TABLE OF CASES CITED

Arverne Bay Construction Co. v. *Thatcher*, 278 N. Y. 222 ..... 7, 11

Bankers Trust Co. v. *Blodgett*, 260 U. S. 647 13

Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194 9

Champlin Refining Co. v. *Corporation Commission of Oklahoma*, 286 U. S. 210 13

City of Yonkers v. *Rentways, Inc*, 304 N. Y. 499 ..... 7, 11

Matter of Engelsher v. *Jacobs*, 5 N. Y. 2d 370, *cert.* denied, 360 U. S. 902 ..... 11, 12

Hadachek v. *Sebastian*, 239 U. S. 394 ..... 10, 11

Harbison v. *City of Buffalo*, 4 N. Y. 2d 553 ..... 11, 12

Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61 ... 10

Mugler v. *Kansas*, 123 U. S. 623 11

Ohio Tax Cases, 232 U. S. 576 13

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393 6

People v. *Lathrop*, 3 N. Y. 2d 551 13

People v. *Miller*, 304 N. Y. 105 11

Phoenix Ry. v. *Geary*, 239 U. S. 277 13

PAGE

Pierce Oil Corp. v *City of Hope*, 248 U. S. 498 ....11, 12
Post Brick Co. v. *Thompson*, 68 N.Y.S. 2d 159 (Sup. Ct., Nassau Co.) 2
Powell v. *Commonwealth of Pennsylvania*, 127 U. S. 678 11
Queenside Hills Realty Co. v. *Saxl*, 328 U. S. 80 ....10, 11
Reinman v. *Little Rock*, 237 U. S. 171 .....11, 12
Sonzinsky v. *United States*, 300 U. S. 506 13
Matter of Stubbe v. *Adamson*, 220 N. Y. 459 10
Town of Huntington v. *Broad Hollow Estates, Inc.*, 138 N.Y.L.J. #55 Sept. 17, 1957, pp. 11-12 (Sup. Ct., Nassau Co.) 2
Town of North Hempstead v. *Colonial Sand and Gravel Co., Inc.*, 14 Misc. 2d 727; 178 N.Y.S. 2d 579 (Sup. Ct., Nassau Co.) 13
Town of Somers v. *Camarco*, 308 N. Y. 537 .....11, 12
U. S. v. *Carolene Products Co.*, 304 U. S. 144 ..... 9, 10
U. S. v. *Central Eureka Mining Co.*, 357 U. S. 155 ... 11
Matter of Wulfsohn v. *Burden*, 241 N. Y. 288 10

TABLE OF OTHER AUTHORITIES

41 Col. Law Review 457 12
44 Corn. Law Quart. 450 12
102 U. Pa. Law Review 93 12
1951 Wis. Law Review 685 12

INDEX TO APPENDIX

PAGE

Exhibit 1 of Appellee's Appendix 1a
Exhibit 2 of Appellee's Exhibit 14a

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 881

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Town of Hempstead, appellee, pursuant to Rule 16 1(b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal to this Court from the order of the New York State Court of Appeals be dismissed.

Report of Opinion in the Trial Court

Although in their Jurisdictional Statement appellants have set forth the opinions of the Court of Appeals and an opinion by the Supreme Court of the State of New

York (Nassau County) in a case not now before the Court, they did not include the opinion of the Trial Court, the Supreme Court of New York (Nassau County), in the case at bar. That opinion, a comprehensive one which considered separately each of the arguments made by appellants at the trial level in the full context of the evidence adduced at the trial, is set out in its entirety in the Appendix to this brief (Appellee's Appendix, Exhibit 1).

Statement

This case involves the Town of Hempstead's Ordinance No. 16 and its application to appellants' sand and gravel pit. That pit is a sprawling 20 acre crater containing a man-made lake and lying in a 38 acre tract devoted to sand and gravel mining.

Ordinance No. 16 was enacted in 1945 when all the Towns of Nassau County in New York enacted separate ordinances to curtail—in the language of Ordinance No. 16—"the danger to health and life caused by deep excavations remaining in the ground" (Pltf's. Ex. 1; R. 91; opp. p. 10 of R.). Before the enactment of the 1945 ordinances the courts in a number of reported cases had freely noted the peril that lurks in these pits and the lives that had been lost in them.[1] The danger continued to attract the attention of the courts even in more recent years.[2]

Ordinance No. 16 did not prohibit sand or gravel pits or their mining. It merely regulated the conduct of such op-

---

[1] (See e.g. *Post Brick Co.* v. *Thompson*, 68 N.Y.S. 2d 159, 161 (Sup. Ct., Nassau County) (not officially reported); *People* v. *Gerus*, 69 N.Y.S. 2d 283, 291 (Co. Ct., Nassau Co.) (not officially reported)).

[2] (See e.g. *Town of Huntington* v. *Broad Hollow Estates, Inc.*, 138 N.Y.L.J. #55 Sept. 17, 1957, pp. 11-12 (Sup. Ct., Nassau Co.); aff'd without opinion 172 N.Y.S. 2d 543 (not otherwise reported)).

erations in order to minimize the dangers to life, health and property that had been caused by their unregulated use. Set back requirements, degree of bank slope, fence and retaining wall provisions were prescribed by its terms. These provisions operated to prevent cave-ins, falls and unsettling of properties neighboring on sandpits. In time, the ordinance was amended to provide that no pit excavation should penetrate the water table at the site; this provision was designed to eliminate the menace of children drowning in huge artificial lakes like the one here involved. The provision was inspired by the commonly known appalling statistics of children's drownings in such pits, of which both appellate courts below were asked to take notice.

Appellants' pit occupies slightly more than half the area of the 38 acre tract owned and operated by appellants in East Meadow, Town of Hempstead. Plaintiff's Exhibit 2 at the trial, a large aerial photograph, is a picture of the pit and the surrounding residential area. For the Court's convenience it has been reduced in size and is annexed to this brief (Appellee's Appendix, Exhibit 2). The pit itself is filled with water to an average depth of about 25 feet. In some places the water is as deep as 48 feet (Appellee's Appendix, p. 3a; Pltf's. Ex. 3, R. 139). The formation of this lake has resulted from excavation by appellants beyond the maximum level now permitted by Ordinance No. 16 (152-157). Although a body of water of undetermined size was first formed by appellant's excavations some 30 years ago, this water-filled crater became progressively larger and deeper with the continuance of the operation until finally it formed the present 20 acre lake.

The pit lies in the midst of a densely populated area where children and schools abound. There are approximately 2,200 homes within a 3,000 feet radius of the center of the sandpit with an estimated population of 8,800 people (Appellee's Appendix, p. 3a, R. 165). Four public schools are located within a radius of 3,500 feet; their en-

rollment is about 4,500 children. Within 1,500 feet there is situate a church where each day about 700 students (or each week about 3,500 students) receive religious instruction (R. 100-102; 110-115; 130).

There is no dispute over the fact that the pit flagrantly violates a number of the ordinance's more substantial proscriptions (see Appellee's Appendix, p. 3a): (a) in many places the excavation commences within 20 feet of the adjoining property line; (b) in certain places the pit excavation is more than 10 feet below the established grade of the nearest public street and the incline of the sidewalls is more than 2 horizontal feet to 1 vertical foot without the support of retaining walls; (c) there is no concrete curb beneath the fence which encloses the premises and (d) appellants' excavation goes far beyond the maximum depths allowed by the ordinance, thus penetrating the water table creating the described huge, artificial lake (R. 136-159; Pltf's. Ex. 3, R. 139; Pltf's. Ex. 4; R. 141; R. 160-169).

On the trial, appellants did not challenge the existence of the violations. They made two principal arguments by way of affirmative defenses: first, that the ordinance was unconstitutional and void because it was unjustly discriminatory, and second, that an earlier judgment of the Supreme Court, Nassau County in an action brought under an entirely different ordinance, was *res judicata* of the matters here litigated. Appellants also argued that the ordinance was unconstitutional in that it deprived appellants of its only possible profitable use of the premises and was thereby confiscatory. *Ex post facto*, and a number of other arguments since abandoned, were also urged (R. 650-680).

In its lengthy opinion (Appellee's Appendix, Exhibit 1) the Trial Court considered these defenses and rejected each of them. Appellants' argument with regard

to confiscation, which in the metamorphosis that has ensued since the trial of this case is now the appellants' principal contention, was specifically rejected by the Trial Court because of a total failure of proof (Appellee's Appendix, p. 9a). This factual disposition was unanimously affirmed by the Appellate Division of the Supreme Court (R. 757-762), and affirmed again by the Court of Appeals in the order from which this appeal is taken (Appellant's Appendix, pp. 17a-19a).

The Court of Appeals, in the opinion written for the majority by Judge Burke (Appellants' Appendix, pp. 1a-3a) noted the unanimous factual finding of the courts below with respect to appellants' failure of proof. In that context, Judge Burke adverted to the nature of the pit, its location in a densely populated area where many children reside, the hazards to both life and property, which as a matter of common knowledge accompany the uncontrolled operation of these pits, and found that the ordinance, as applied to the subject pit, could not be deemed arbitrary. He also pointed out that neither the ordinance nor the injunction proscribes sand and gravel excavations but that they merely condition the legitimate conduct of such operations upon compliance with the terms of the ordinance which are, as the Trial Court noted, "clearly suited for the curtailment of the obvious dangers" (Appellee's Appendix, p. 8a).

A dissenting opinion was written by Judge Van Voorhis. Appellants' argument here is an elaboration of that opinion. But the opinion by Judge Van Voorhis, and concomitantly appellants' argument here, are postulated on an assumed and erroneous statement of facts that is no part of the record to which the review in this Court would necessarily be confined. Moreover, even on the basis of the assumed facts on which appellants rely, their position is plainly at variance with the authorities and traditional principles of constitutional law.

The factual misconceptions are so numerous and so critical[8] that they will be separately but briefly noted here.

One of the principal props of appellants' contentions in this Court is the asserted fact that the judgment below, in effect, totally and absolutely prohibits appellants' operations and leaves their land valueless (Jurisdictional Statement, p. 10). The proposition is completely without factual support. Self-evidently neither the ordinance nor the judgment, as Judge Burke noted (Appellants' Appendix, p. 2a), proscribes all future excavations at the site. Indeed, some 18 acres of land remain which have not yet been excavated and are still available for whatever sand they might contain. Appellants' gratuitous suggestion that these 18 acres are needed for processing (Jurisdictional Statement, p. 18) and the dissenting opinion's observation that the photographs show this area "to be entirely occupied by the machinery used in the operation of the sand and gravel pit" (Appellants' Appendix, p. 9a) are simply inaccurate and have been rejected, as matters of fact, by all the courts below. The photographs speak for themselves and reference to the Topographical survey (Pltf's. Ex. 3, R. 139) and arithmetical computation from the figures supplied there would indicate that some 110,000 cubic yards of earth can still be mined in conformity with the ordinance in the unexcavated portion of the tract.

The flat statement in the dissenting opinion that the cost of refilling the existing excavation is in excess of $1,000,000 (Appellants' Appendix, p. 6a) is totally without foundation in this record. The Trial Court pointed this out (Appellee's Appendix, p. 9a). The figure was

---

[8] Traditionally, this Court has treated the question as to whether a given governmental restriction is confiscatory as one which turns upon the record facts of each case. (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.)

borrowed by the dissent, intact and without apparent challenge, from appellants' brief in the Court of Appeals.

Moreover, there is nothing in the record to show that this 38 acre tract—about one half of which is taken up with the pit—might not have some other and valuable use even if unavailable for sand or gravel mining. It is sufficient to note that appellants failed to eliminate any such possibility. That failure obliges the Court to the contrary assumption. (See *City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505; *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232).

The argument based upon the alleged total deprivation of a substantial and potentially profitable use has an additional critical debility. As a matter of fact it was nowhere established that there remained any sand or aggregate that could be profitably mined in the present water-filled excavation where further digging has been enjoined![4] Certainly this Court cannot interpolate such proof at this stage. Indeed, if inferences could now be drawn, they would militate against the possible existence of substantial deposits under the already excavated path of the 38 acre tract. Concededly, this excavation had been continuously mined for some thirty years prior to the subject ordinance (Jurisdictional Statement, pp. 4-5). Each year of excavation brought this depleting asset closer to the point of practical economic exhaustion. On this record that point might very well have been reached at or about the time the instant injunction became effective. At the very least, it is clear that appellants, upon whom the burden of proof lay, did not refute that possibility by proving that there was something of value yet to be mined in the subject excavation when the ordinance was enforced.

---

[4] None of the exhibits indicates whether there is anything to be mined under the water-filled portion of the tract. The fact that varying depths are indicated in the topographical survey is inconclusive. Those maximum depths very likely were established as a result of exhaustion at given points in the pit.

There are other factually inaccurate premises in the substructure of appellants' argument. Thus it is not established that appellants complied with all of the regulations of the 1945 ordinance before its amendment, as is contended in the Jurisdictional Statement (at p. 5) and in the dissenting opinion (Appellants' Appendix, p. 8a). All of the folio references supplied by appellants pertain to the fence provision exclusively (235, 314-316, 319, 527, 528, 532). No attempt was made by appellants to show that its pits complied with all the other provisions of the ordinance before its amendment.

One additional misconception should be noted. In his opinion, Judge Van Voorhis stated that upon the oral argument the attorney for the Town said that the Town does not contend that the pit in question amounts to a nuisance (Appellants' Appendix, p. 8a). This single factor may very well have been a decisive consideration in Judge Van Voorhis' deliberations. Certain it is that the assumption is important to appellants' position (Jurisdictional Statement, p. 17). But as a matter of fact the statement in the dissent is not accurately descriptive of appellee's contention on oral argument. Whatever the cause of the misunderstanding, it should have been clear to the entire court, that appellee did not concede that the pit was not a nuisance. Indeed, at every stage of the litigation, throughout a total of six written briefs or memoranda and argument in four different courts, appellee argued quite the contrary. It has been appellee's consistent position that the appellants have not proved Ordinance No. 16 to be arbitrary or unreasonable irrespective of whether the pit could be said to constitute a technical "nuisance". Equally consistent has been appellee's position that the pit with its numerous violations of the ordinance *does* in fact constitute such a nuisance. The trial Court so held, in effect (Appellee's Appendix, p. 8a) and was affirmed by both State appellate courts. The argument was thus spelled out with simple

clarity in appellee's brief in the Court of Appeals: "Pits like the subject one constitute such a public nuisance." (See appellee's "Respondent's Brief in the Court of Appeals", p. 33.)[5] This argument was acknowledged by appellants. (See appellants' "Reply Brief in the Court of Appeals", p. 19.) That contention was repeated by appellee's counsel throughout his oral argument in the Court of Appeals (as it was urged in the Appellate Division), and although appellants now eagerly subscribe to the "concession" described by Judge Van Voorhis, no mention of it was made by their counsel in his reply argument before the Court of Appeals.

Thus, it seems evident that the position of the dissenters in the Court of Appeals, the position now taken by appellants in this court, is bottomed upon a series of factual hypotheses that have no place in the case at bar. When the case is limited to the facts in the record, the facts found and affirmed by all the courts below, the order appealed from is so clearly supported by the cumulative impact of compelling appropriate and well established decisional principles that no substantial Federal question exists. Those principles are briefly set out in the following pages.

ARGUMENT

The questions raised by appellants do not constitute substantial Federal questions.

Ordinance No. 16 comes before this Court attended by the familiar, weighty presumption of reasonableness and constitutionality which presumes the existence of necessary factual support for the enactment's provisions (*Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 210; *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154)

---

[5] See also appellee's "Respondent's Brief in the Court of Appeals", pp. 16-17, 38.

if only the ordinance is related to some evil or threat to the community that is "reasonably apprehended" (*Matter of Stubbe* v. *Adamson*, 220 N. Y. 459). The heavy burden of rebutting this presumption rests, of course, with the assailant who must prove unconstitutionality beyond a reasonable doubt (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79).

Certainly the evil here is, at the very least, "reasonably apprehended" (*Matter of Stubbe* v. *Adamson, supra*). Both the Trial Court and the Court of Appeals adverted to the dangers to life and property as common ones. The statistics of fatalities by drownings in sandpits in Nassau County including, as Judge Van Voorhis noted (Appellants' Appendix, p. 10a), a death in the very pit in question, speak eloquently in justification of the provisions of Ordinance No. 16.* Other considerations, like the threat to property and property values inherent in unregulated pits, also militate in support of the ordinance (See *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 296).

As a simple matter of fact, appellants failed to bear the burden of proving the provisions of the ordinance unreasonable. They produced "little, if any, evidence" (Appellee's Appendix, p. 8a), and to their contention that there are more appropriate ways of dealing with the problems created by the subject pits, Mr. Justice Douglas' observations in *Queenside Hills Realty Co.* v. *Saxl* (328 U. S. 80; 82-83) are the short and conclusive answer.

Of course, ordinances like the one at hand many times result in hardship to individuals, but unless the law is patently arbitrary the individual interest must bow to the general welfare (*Hadachek* v. *Sebastian*, 239 U. S. 394, 410). In a case like this one, where the legislative body

---

* The appellate courts below were asked to take judicial notice of these statistics as is this Court. See *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500; *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154.

has decreed that the object of the ordinance poses a serious threat to the health and safety of the community as well as to property and property values, an exercise of the police power in an ordinance like Ordinance No. 16 is not invalidated though its effect is to deprive the individual's property of its only profitable use (*Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Commonwealth of Pennsylvania*, 127 U. S. 678; *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadachek* v. *Sebastian, supra; Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498; *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155). Here, therefore, even had appellants been deprived of the only profitable use of their property it would not have constituted a defense to enforcement of the ordinance against them.

It has been pointed out earlier that the case at bar is not nearly as extreme as those just noted. Appellants have not proven that the premises in question (whether the 20 acre pit is considered by itself or as part of the larger 38 acre tract) have no possible profitable use as a result of the ordinance's operation (*City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505; *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232).

Indisputably, appellants' position is no stronger simply because their use began at a time before the ordinance was adopted. No permanent right to imperil the health or impair the safety and welfare of the community ever vests (*Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 84; *Hadachek* v. *Sebastian*, 239 U. S. 394, 410; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, 375, *cert.* denied 360 U. S. 902). Thus no reference to pure zoning ordinance cases like those relied upon by appellants (See Jurisdictional Statement, pp. 6, 12, 19-20; citing in reliance *People* v. *Miller; Town of Somers* v. *Camarco* and *Harbison* v. *City of Buffalo*) is helpful here. The traditional immunity of non-conforming uses from the application of zoning ordinances is altogether inappropriate to a consideration of regulatory ordinances designed to regulate certain uses

so as to avoid or minimize serious peril to the public health, safety and welfare. From time immemorial the inherent power of a community to protect itself against uses which threaten the public safety has been recognized. Thus, a nuisance can, in fact, be totally prohibited by a municipality (See *Reinman* v. *Little Rock; Hadachek* v. *Sebastian; Pierce Oil Corp.* v. *City of Hope*, all *supra*, and also 41 Col. Law Review 457, 459-467). The very cases relied upon by appellants (*Town of Somers* v. *Camarco*, 308 N. Y. 537, 541; *Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553, 561) and the law review authorities relied upon by them in the Court of Appeals (e.g., 102 U. Pa. Law Review 93; 93, 94, 102; 44 Corn. Law Quart. 450, 452; 1951 Wis. Law Review 685, 692-695) note these traditional principles and the distinction between zoning ordinances and ordinances like the one at bar.

This distinction serves also to illustrate the complete lack of merit in appellants' contention that the ordinance is a legislative act which takes away rights once vested by a judgment. In the pleadings, upon the trial and in the Appellate Division, this argument was not made in its present form. In substance, however, it is identical with the argument made by appellants in the pleadings and at the trial that the judgment in the 1956 action was *res judicata* of the issues raised here. Whether stated as it was below or cast in constitutional terms as it is in this Court, the argument is equally vulnerable. The thrust of this contention is that once rights have been established by a judgment those rights are deemed vested and cannot be impaired either by subsequent legislation or a second judgment. But the precise rights declared by the earlier judgment referred to by appellants were entirely different from those here affected. The prior action involved an entirely different ordinance, the zoning ordinance of the Town of Hempstead and established that appellants had the right to operate in a "B" residence zone despite the zoning ordinance. Since it was not an action to enforce

Ordinance No. 16 it obviously could not pass upon any alleged rights of the appellants with reference to that separate regulatory ordinance of the Town (See Appellee's Appendix, pp. 4a-5a).

Appellants' contention that the ordinance violates the constitutional prohibition of *ex post facto* laws on the assumption that they are liable to criminal penalties provided in the ordinance, is plainly beside the mark. This action involves no attempt to enforce penalties and the ordinance itself contains a "Separability" section which provides that if any part of the ordinance is declared invalid that declaration of invalidity shall not affect the remainder of the ordinance (Section 11, opp. p. 12 of R.). The penalty clauses therefore, even if themselves unconstitutional, are severable and consequently there is no present occasion to pass upon their validity (*Ohio Tax Cases*, 232 U. S. 576, 594; *Phoenix Ry.* v. *Geary*, 239 U. S. 277, 283; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma, et al.*, 286 U. S. 210; *Sonzinsky* v. *United States*, 300 U. S. 506, 512; *People* v. *Lathrop*, 3 N. Y. 2d 551; *Bankers Trust Co.* v. *Blodgett*, 260 U. S. 647).

Finally, it might be noted that the prevailing theme of appellants' argument (and of the dissenting opinion in the Court of Appeals) is the suggestion that Ordinance No. 16 was manufactured by the Town of Hempstead with the exclusive purpose of in some manner acquiring appellants' land. The suggestion is on its face a specious one. Ordinance No. 16, far from being directed exclusively at appellants' pit, was adopted in 1945 at a time when *all* the towns of Nassau County adopted similar regulations. These ordinances are commonplace. Some of the cases already cited show their application to a number of excavations in various parts of New York's Long Island region.[7] More-

[7] See also *Town of North Hempstead* v. *Colonial Sand and Gravel Co., Inc.*, 14 Misc. 2d 727; 178 N.Y.S. 2d 579 (Sup. Ct., Nassau Co.).

over, and this should be self-evident, the Ordinance does not result in a "taking". Eighteen acres of land as yet unexcavated remain available. More significantly, even if the mineral content of these eighteen acres has been exhausted and mining is no longer practicable, it has by no means been established that this 38 acre tract of land in a prosperous, burgeoning residential area is now valueless in the hands of the appellants.

On this factual issue of confiscation, as on virtually every factual issue in the case, the appellants adduced, as the Trial Court wrote, "little, if any evidence". In this Court, as in the Courts below, the appellants have devised an attack on Ordinance No. 16 relying on general principles that find no sustenance in the record.

CONCLUSION

The alleged Federal questions presented by appellants are predicated upon an assumed and inaccurate statement of facts, and, in any event, are not substantial. Accordingly, the appeal should be dismissed.

Respectfully submitted,

RICHARD P. CHARLES,
Special Counsel to John A. Morhous,
Attorney for Appellee.

RICHARD P. CHARLES,
WILLIAM C. MATTISON,
MARIO MATTHEW CUOMO,
Of Counsel.

Exhibit 1 of Appellee's Appendix

OPINION OF THE TRIAL COURT IN THE CASE AT BAR

TOWN OF HEMPSTEAD, Plaintiff, *v.* HERBERT W. GOLDBLATT et al., Defendants.

Supreme Court, Special Term, Nassau County,
July 13, 1959.

MARIO PITTONI, J. The town sues to enjoin the defendants from mining and dredging a certain sand pit located on the east side of Newbridge Avenue in the East Meadow section of the town until the defendants obtain a permit required by Town Ordinance No. 16, and until violations of section 4 of that ordinance are cured.

The defendants in their answer claim *res judicata*, protection of the *ex post facto*, of the due process, and of the equal protection clauses of the Constitutions, and the motives of the town officials as defenses.

It appears that the subject property, hereinafter sometimes called the sand pit, is 38 acres in size and has been used for the commercial mining of sand and gravel since 1927.

On December 18, 1945 the town adopted Ordinance No. 16 entitled, "Bank and Pit, Topsoil Removal and Other Excavations". Its declaration of policy (§ 1) states among others that the ordinance was "to prevent all manner of excavations which create pits, holes, or hollows in the earth, leaving it in a hazardous or dangerous state, or cause soil erosion • • • to remove the danger to health and life caused by deep excavations remaining in the ground • • • which ordinance will promote the safety, health and general welfare of the people of the Town".

The ordinance then goes on to say:

> Section 4 (as amended Nov. 25, 1958) (a) No Pit Excavation shall be made within twenty (20) feet of any property line.

Exhibit 1 of Appellee's Appendix

(b). No pit or bank excavation shall be made greater than ten (10) feet below the established grade of the nearest public street or highway unless the side walls remain at an incline of at least two horizontal feet to one vertical foot or are supported by retaining walls * * *.

(c). All pit and bank excavations shall be completely surrounded by wire fencing of the type known as chain link or cyclone fence, or its equivalent, of the height of six (6) feet set on a concrete curb not less than 18 inches in depth, with no opening except necessary gates for ingress and egress, to prevent public access to the top of any pits or deeply graded slopes.

(e). No removal of earth from the ground shall be so made as to undermine, weaken or deprive of support other lands in the vicinity * * *

(g). No removal of earth from the ground shall be so made as to prevent or interfere with the orderly development, for residential, business, manufacturing or public purposes, of other lands in the vicinity, * * * or as to substantially depreciate the value of real property in the vicinity.

(h). No excavation shall be made below two feet above the maximum ground water level at the site.

(i). The Town Board may deny any application for a permit hereunder if it shall find that the proposed excavation will violate any of the provisions of this section, * * *.

(j). When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance, * * * such pit or part thereof shall be immediately refilled with clean, non-

> burnable fill * * * and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

In the meantime, and since the subject property was first used as a commercial sand mining and dredging operation, the surrounding area of East Meadow has changed from a sparsely to a densely populated region, and the subject property has become a huge crater, or sand pit, in which there is an artificial lake that extends over 20 acres of the pit. The average depth of the water in this lake is approximately 25 feet, but in some areas the water is as deep as 48 feet. There is a link fence around the sand pit, but there is no concrete curb beneath it; and there are several holes under this fence, evidently dug by children, and large enough for human beings to crawl through. In numerous areas the pit commences at a distance less than 20 feet from the nearest property line, and in at least one instance the excavation commences at a distance less than 10 feet. The slopes of the sides of the pit in many places exceed two horizontal feet to one vertical foot. Also, the pit is more than 10 feet below the grade of the nearest public street.

Within a radius of 3,000 feet of the center of the sand pit are 2,200 homes with an estimated population of 8,800 persons; within a radius of 3,500 feet are 4 public schools with an enrollment of 4,532 pupils; and within a radius of 1,500 feet of this pit is a church where each week 3,600 pupils receive religious instruction.

Evidence on behalf of the defendants establishes that there are certain excavations, some dry and some water filled, and bodies of water such as lakes, brooks, streams, creeks, etc., within the town which are not in conformance with the standards of the ordinance. However, there was no evidence as to whether these excavations and bodies

were private, governmental, in use, or abandoned. A New York City-owned reservoir with no fence and a sharp slope was also shown.

A county official called by the defendants testified that there are approximately 400 water drain basins or sumps in Nassau County. Of these 300 are owned and supervised by the County and have fences around them; but approximately 100 of these still have no concrete curbs under the fences although the county has since 1952 been installing these curbs. The berm width specifications for these county sumps vary with the nature of the sand and the topographical conditions encountered. It was pointed out too that sumps by and of their very nature must be constructed so that the bottom is above maximum level, and that the standard regulation for the construction of sumps calls for a minimum of two feet above maximum ground water.

The first defense raised by the defendants is *res judicata*. This is based upon a judgment entered April 9, 1956 in an action by the town against the same defendants to enjoin them from operating the sand pit in violation of a zoning ordinance. Mr. Justice HILL, citing *People* v. *Miller* (304 N. Y. 105) and *Town of Somers* v. *Camarco* (308 N. Y. 537), denied the injunction on the ground that the defendants' substantial operation of the sand pit prior to the enactment of the zoning ordinance entitled the defendants to a nonconforming use. The issue in that case was one of vested property rights in the face of subsequently enacted zoning restrictions. The present action by the town is pursuant to an ordinance which regulates uses regardless of locations or zones under its governmental police powers for "the safety, health and general welfare of the people of the Town" (Ordinance No. 16, § 1). In the very *Town of Somers* v. *Camarco* (308 N. Y. 537, 541, *supra*) case cited by Mr. Justice HILL, the court said: "We do not

pass upon the question of what may be a proper exercise of the town's police powers so as to prevent the creation or maintenance of a nuisance on the premises of the defendants, or to otherwise lawfully regulate the defendants' business."

A judgment in one action is not conclusive when the two causes of action are different in the rights and interests affected, and the estoppel of *res judicata* is limited in such circumstances to the point actually determined. It is clear, therefore, that the causes of action and the issues of these two cases are not the same, and that the substance of the rights or interests established in the first action will not be destroyed or impaired by the prosecution of the second (*Schuykill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 307, 308).

It should be added that a motion by the defendants to dismiss a similar complaint against them by the town on the grounds of *res judicata* was denied by Mr. Justice CHRIST on September 13, 1956 (No. 6447—1956, Cal. No. 209) when he said: "it is plain that the issues indicated by the present complaint were not adjudicated in the prior action."

Another defense is that the sand pit was operated prior to the enactment of the ordinance and for that reason is immune against the exercise of this regulatory police ordinance. However, it is firmly established that a prior nonconforming use, whether judicially declared or not, does not make it immune against laws, ordinances and regulations of a police nature such as the one now in issue (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 84; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. denied 360 U. S. 902; *Health Dept.* v. *Rector of Trinity Church*, 145 N. Y. 32, 43, 44; *Town of North Hempstead* v. *Colonial Sand & Stone Co.*, 14 Misc. 2d 727, 731 [HOGAN, J.]; *People* v. *Gerus*, 19 Misc. 2d 389, 393-395 [Nassau County, JOHNSON, J.]).

Exhibit 1 of Appellee's Appendix

The defendants also argue that the ordinance applies only to sand pits which are to be started in the future and that it does not apply to sand pits in being at the time of its enactment. A reading of the ordinance shows no provision exempting sand pits in operation at the time of its enactment, and it is obvious that the ordinance was intended to apply also to pits already in being and in operation. Whereas the opening of future sand pit excavations could be controlled by zoning regulations, the only protection against the abuse of existing uses has to come from these regulatory ordinances. This is particularly true when it has already been held that the defendants have the right to a nonconforming use under the authority of *People* v. *Miller* (304 N. Y. 105, 107), and *Town of Somers* v. *Camarco* (308 N. Y. 537, *supra*). Under the circumstances, it would be unreasonable to hold that the town, which was aware of the dangers posed by unregulated excavations (see Declaration of Policy of Ordinance No. 16, § 1), could have intended to exempt the sand pits in operation at the time of the adoption of the ordinance. Ordinances similar to this one have been interpreted as applying to sand pit uses in being at the time of the enactment of the ordinance (*Town of North Hempstead* v. *Colonial Sand & Stone Co.*, 14 Misc. 2d 727, 731, *supra* [HOGAN, J.]; *People* v. *Gerus*, 19 Misc. 2d 389 [JOHNSON, J.]). In the *Town of North Hempstead* v. *Colonial Sand & Stone Co. case*, Mr. Justice HOGAN said (p. 731): "Nor is there merit in their contention that the ordinance, by its express language, is intended to apply only to operations commenced after its adoption. It is a well-settled rule of statutory construction that an act shall be interpreted in the light of the mischief felt and the objects and the remedy in view (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 95 and cases cited therein). The Town Board cannot have intended in 1946, that an established opera-

tion should be permitted to continue untrammeled while a new one of precisely the same nature required drastic controls. It is equally well settled that 'A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination' (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 147). Accordingly, the court holds that the ordinance is intended to operate equally upon all operations of a similar nature, regardless of the date upon which each was commenced. This interpretation needs no reconciliation with the Declaration of Policy, the preamble of the ordinance (*supra*)."

Still another defense raised by the defendant is *ex post facto*. Obviously, such a defense has no place in this civil trial; that doctrine applies only to criminal cases (*Calder* v. *Bull*, 3 Dall. [3 U. S.] 386, 390; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 152, 153; *Bankers Trust* v. *Blodgett*, 260 U. S. 647, 652; *Matter of L'Hommedieu* v. *Board of Regents*, 276 App. Div. 494, affd. 301 N. Y. 476; 16 C. J. S., Constitutional Law, § 99, pp. 435, 437).

The defendants also contend that the ordinance is unconstitutional in that it is confiscatory and unreasonable as applied to them. In this respect they contend that the plaintiff has failed to establish the reasonableness of the ordinance itself. But it is fundamental that an ordinance such as this is presumed constitutional (*Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, 210); that the burden of showing the ordinance to be unreasonable rests upon the assailant (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, 118; *New York Trap Rock Corp.* v. *Town of Clarkstown*, 1 App. Div. 2d 890 [2d Dept.], affd. 3 N. Y. 2d 844) and that this unconstitutionality must be established beyond a reasonable doubt (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219, *supra*; *Defiance Milk Prods. Co.* v. *Du Mond*, 309 N. Y. 537, 540, 541). Only as a last resort may courts strike

down legislative enactments on the ground of unconstitutionality (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219, *supra*; *Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, 555, affd. 344 U. S. 367).

Under the tests as above stated the defendants have failed to sustain their burden of proof; in fact, little, if any, evidence was adduced to show the unreasonableness of the provisions concerning the width of the berms, fences, depth requirements and the like. They did give testimony that no cave-ins had occurred at the sand pit within the past 30 years. However, even if that be true, the town is not precluded from anticipating a danger and providing for a protection against it before it materializes. This is proper within its police power (*City of Rochester* v. *West*, 164 N. Y. 510, 514; *Town of Southport* v. *Ross*, 284 App. Div. 598 [3d Dept.]). Against this danger clearly recognized by the town (Ordinance No. 16, § 1), the defendants produced nothing to show that the ordinance had no reasonable relation to the dangers and undesirable features inherent in their sand pit.

Even without the benefit of the presumption of validity the provisions of the ordinance are clearly suited for the curtailment of the obvious dangers. Thus, the requirements concerning setbacks, slope requirements, fences, retaining walls, maximum ground levels and other such requirements, all provide protection against the danger of cave-ins, falls and drownings. These requirements are particularly pertinent here where the sand pit is a huge sprawling crater filled with water to an average depth of some 25 feet and forming a permanent, artificial lake of stagnant water in a densely populated community with thousands of children.

Then too, the right to use one's property may run in conflict with the interests of adjoining land owners. It is one thing to use your property—it is another to empty, to exhaust or to deplete your property so as to cause cave-ins or otherwise undermine the properties of adjoining land

owners. It is obvious without further belaboring the point that the deeper the digging and the closer to the adjoining land, the greater the danger to the latter and the homes thereon caving in.

Other considerations, such as the detrimental effect of this sand pit on the property values in the neighborhood, although not by themselves persuasive, add support to the reasonableness of this ordinance (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298; *Post Brick Co.* v. *Thompson*, 68 N.Y.S. 2d 159 [HALLINAN, J.]; *People* v. *Gerus*, 19 Misc. 2d 389, 397 [JOHNSON, J.] *supra*).

It may be that the enforcement of this ordinance will result in some economic hardship to the defendants; however, the exercise of police power in the interests of the public at large is generally in conflict with individual interests; and if the end sought is legitimate and the law is not arbitrary the individual interest must bow to the interest of the general welfare. This is particularly true when the object of the law poses a serious threat to public safety (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 302, *supra; Hadacheck* v. *Los Angeles*, 239 U. S. 394).

In support of the defendants' contention that their property is being confiscated, there is nothing in the evidence to sustain it. There is no evidence to show that the defendants cannot conform to the ordinance or what the cost to the defendants would be if they attempted to conform. Under the circumstances the court cannot guess or read into the record proof which is not there (*City of Yonkers* v. *Rentways*, 304 N. Y. 499, 505). In the *Rentways* case, Judge FULD said: "defendants, though they have attacked the ordinance as confiscatory, have completely failed to establish or present proof that there has been confiscation in fact. * * * Completely absent is any showing that * * * if such construction were impossible, that such could not be converted to some other profitable use."

Exhibit 1 of Appellee's Appendix

Even if the defendants had established that the enforcement of the ordinance were a practical prohibition, it would not be of assistance to them in this case where the danger to the public safety and welfare is a real and serious one. (*Hadacheck* v. *Los Angeles*, 239 U. S. 394, *supra*; *People* v. *Gerus*, 19 Misc. 2d 389, 393-395, *supra* [JOHNSON, J.]; *Lizza & Sons, Inc.* v. *Town of Hempstead*, 19 Misc. 2d 403 [JOHNSON, J.], affd. 272 App. Div. 921.)

Although the defendants did not allege the protection of the equal protection clauses of the Constitutions in their answer, they did take the position at the trial that the prosecution of his action against them constitutes discriminatory enforcement; that is, a failure to enforce the ordinance as against "other areas which violate the same ordinance". If we assume, for the sake of argument, laxity on the part of the public officials in the enforcement of the ordinance so as to result in unequal application of the law, that would not by itself constitute this present action a violation of the equal protection clauses. It is only where the party affected can show a palpable and deliberate scheme to oppress him while excluding all others who come within the terms of the ordinance that such an objection can be sustained (*Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Snowden* v. *Hughes*, 321 U. S. 1, 8, 15; *People* v. *Friedman*, 302 N. Y. 75, 80, 81).

In the *Friedman* case the court said that it is not required under the equal protection clauses that the ordinance "be perfectly symmetrical in its pattern of exclusions and inclusions". And again, quoting from the same case, the proof here does not show "a pattern of discrimination consciously practiced, as in *Yick Wo* v. *Hopkins* (118 U. S. 356); it merely indicated some nonenforcement as to certain other businesses many of which were allowed to remain open for the sale of permitted commodities".

An examination of the defendants' evidence fails to show that they have sustained their burden of proof in

this respect. Their evidence merely establishes that certain excavations, some dry and some water-filled, and certain bodies of water, such as lakes, brooks, streams, creeks, etc., within the town exist without conforming to the standards of the ordinance involved. The defendants have failed to show whether these excavations and bodies of water were private, governmental, abandoned or in use. Furthermore, none of these were shown to be presently operated or operating sand pits against which the ordinance is directed. Also, during the trial the defendants took the position that the ordinance should have been enforced against the Nassau County sumps; however, these county properties are dedicated to a vital public use and, therefore, do not come within the terms of the ordinance (§§ 2, 9). Then too, what authority would the town have to act against the county, another and superior governmental body?

If the defendants contend that the exemption of these county properties constitutes discrimination, not in the enforcement but on the face itself, then too that contention is not acceptable. The equal protection clauses do not deprive a municipality of the power to classify in the adoption of police power regulations; for it is well recognized that evils in the same area may be of different dimensions and proportions requiring, at least in the legislative body's opinion, different remedies (*Tigner* v. *Texas*, 310 U. S. 141); and the legislative body may confine its regulations and restrictions to those cases where the need is deemed to be clearer or more apt to exist (*Packer Collegiate Inst.* v. *University of State of N. Y.*, 273 App. Div. 203, 208, 209 [3d Dept.]; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379). "With the wisdom of such choice the courts have nothing to do; it is a matter solely for the Legislature to consider." (*Packer Collegiate Inst.* v. *University of the State of N. Y.*, 273 App. Div. 208, 209, *supra* [3d Dept.].)

Clearly, there is a sufficient basis for the classification in the present ordinance. These county sumps, or basins, differ from the permanently flooded sand pit involved herein. First, the existence of these basins or sumps is a necessity throughout Nassau County as a matter of survival. They must from time to time contain varying amounts of rain water; but this is not a permanent condition. It continues or lasts only so long as it is necessary for the trapped waters to run back into the ground. Furthermore, these basins or sumps all fall within the jurisdiction of the County of Nassau and are subject to the rules and regulations of that municipality. Thus, the county sumps or basins are sufficiently distinct from the sand pit or sand pits affected by the ordinance to take this case out of the equal protection clauses of the Constitutions.

The defendants' further contention that the town has failed to sustain the burden of proof on the inadequacy of a remedy at law is specious. The power to bring a criminal prosecution against the defendants for a violation of the ordinance herein is not such an adequate remedy at law which ordinarily bars injunctions. That is hornbook law for which no citation is needed. Furthermore, section 135 of the Town Law states: "The town board may * * * maintain an action or proceeding in the name of the town in a court of competent jurisdiction to compel compliance with or to restrain by injunction the violation of any * * * ordinance, rule or regulation, *notwithstanding that the ordinance, rule or regulation may provide a penalty or other punishment for such violation.*" (Town Law, § 135, as amd. by L. 1955, ch. 336, L. 1958, ch. 656; emphasis supplied.)

The last point raised by the defendants is the alleged motives of the town officials in bringing this injunction suit to court. It must be pointed out at the very outset

that on principle alone this contention is not acceptable. Any prior action or lack of action on the part of public officials may not be used as a bar to the bringing of an action when the action is in a representative capacity on behalf of the public. Public officials have no power and no right to waive their duties or obligations to enforce the law on behalf of the public for whom they are public servants. In other words, their individual actions are not binding upon the public whom they serve and on whose behalf actions such as this are and must be prosecuted. In short, the motives of the officials enforcing the ordinance are not relevant in this case (*Chase-Hibbard Milling Co.* v. *City of Elmira*, 207 N. Y. 460, 467; *Waterloo Woolen Mfg. Co.* v. *Shanahan*, 128 N. Y. 345, 362).

In the *Chase-Hibbard* case (*supra*, p. 467) the court said: "If the public authorities were authorized to do what they did do with the river channels, the reasons that moved them do not concern the plaintiff. * * * The assignment of an improper motive, or reason, for doing an act, which the municipality was authorized to perform could not make the act illegal."

In the *Waterloo* case (*supra*, p. 362) the court said: "If the state has the right * * * then the motives that underlie the act are not material. The reasons that move the public authorities do not concern the plaintiff."

It does not appear that the defendants have raised any other issues.

The court thus finds that Ordinance No. 16 and the enforcement thereof are valid exercises of the town's police power; the plaintiff is therefore entitled to the relief demanded in the complaint.

This is the decision of the court pursuant to section 440 of the Civil Practice Act.

Settle judgment on notice.

Exhibit 2 of Appellee's Appendix.

(See opposite ☞)